



August 16, 2005

MEMORANDUM

SUBJECT: Revised Financial Assurance Language of the Model CERCLA Remedial Design/Remedial Action (RD/RA) Consent Decree and Consultation Requirement

FROM: Susan E. Bromm, Director /s/
Office of Site Remediation Enforcement (OSRE)

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Environment and Natural Resources Division
U.S. Department of Justice (DOJ)

TO: Office of Regional Counsel Superfund Branch Chiefs, Regions I-X
Superfund Division Directors
Deputy Chiefs, Environmental Enforcement Section, DOJ
Assistant Chiefs, Environmental Enforcement Section, DOJ
Chief, Deputy Chief, Environmental Defense Section, DOJ
Assistant Chiefs, Environmental Defense Section, DOJ

The Office of Site Remediation Enforcement and the Department of Justice are pleased to issue revised model CERCLA RD/RA Consent Decree language for financial assurance. In FY 2006-2007 ensuring compliance with financial assurance requirements will be an Office of Enforcement and Compliance Assurance national priority. This model language will further that priority by requiring that responsible parties provide adequate financial assurance for completion of the cleanup at the time they enter into an RD/RA Consent Decree. We would like to extend our appreciation to the regional offices and the Office of General Counsel for their assistance in developing this revised language.

This revised financial assurance language clarifies and strengthens the existing model settlement language and insures that EPA has a right to access financial assurance in the event of a work takeover. This revised financial assurance language includes (1) a revised Article XIII (formerly "Assurance of Ability to Perform Work" and renamed "Performance Guarantee") and (2) a revised Paragraph 95 ("Work Takeover"). Conforming changes to Paragraph 95 were

necessary to support the revised Article XIII.

The revisions to the model also make explicit that insurance may be an acceptable form of financial assurance. Although it has been our practice to allow insurance as financial assurance, the prior model CERCLA RD/RA Consent Decree language did not include this option.

The revisions to the model CERCLA RD/RA Consent Decree can be found on the EPA intranet at <http://intranet.epa.gov/oeca/osre/documents/models.html> and will soon be available on the EPA internet at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-fa-mem.pdf>

Prior to the execution of any Consent Decree with a settlement value in excess of \$5,000,000, the Regions should consult with OSRE staff regarding (a) the financial assurance provisions of the RD/RA Consent Decree and (b) the forms(s) of any financial assurance mechanism(s). This consultation will be in effect for two years, after which the consultation requirement will be reevaluated. OSRE's *CERCLA Prior Approval, Concurrence and Consultation Roles Chart* (07/13/01) will be revised to reflect this new consultation. This financial assurance consultation is intended to assist the Regions during the initial implementation of the revised financial assurance language and provide EPA with information about and a better understanding of the larger settlements in EPA's financial assurance portfolio.

If you have any questions regarding the revised language please contact either Bob Polin (202-564-4292) or Tim DiCintio (202-564-4790) in OSRE or Steve Keller (202-514-5465) in EES/DOJ.

Enclosures

cc: Earl Salo, OGC
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____
_____ DIVISION

UNITED STATES OF AMERICA
[and STATE OF _____]

Plaintiffs,

v.

_____, INC.,

Defendants.

CIVIL ACTION NO. _____

MODEL RD/RA CONSENT DECREE
(August 9, 2005 Revisions to May 2001 Model)

[FINANCIAL ASSURANCE SECTION ONLY]

This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA and DOJ may take action at variance with this model or its internal implementing procedures.

XIII. Performance Guarantee

46.1. In order to ensure the full and final completion of the Work, Settling Defendant(s) shall establish and maintain a Performance Guarantee for the benefit of EPA in the amount of \$[insert estimated cost of Work] (hereinafter “Estimated Cost of the Work”) in one or more of the following forms, which must be satisfactory in form and substance to EPA:

a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. One or more irrevocable letters of credit, payable to or at the direction of EPA, that is issued by one or more financial institution(s) (i) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal or State agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee (i) that has the authority to act as a trustee and (ii) whose trust operations are regulated and examined by a U.S. Federal or State agency;

d. A policy of insurance that (i) provides EPA with acceptable rights as a beneficiary thereof; and (ii) is issued by an insurance carrier (a) that has the authority to issue insurance policies in the applicable jurisdiction(s) and (b) whose insurance operations are regulated and examined by a State agency;

e. A demonstration by one or more Settling Defendants that each such Settling Defendant meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied; or

f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (i) a direct or indirect parent company of a Settling Defendant, or (ii) a company that has a “substantial business relationship” (as defined in 40 C.F.R. § 264.141(h)) with at least one Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work that it proposes to guarantee hereunder.

46.2. **[For initial guarantees under subsections a, b, c, d, or f:]** Settling Defendant(s) have selected, and EPA has approved, as an initial Performance Guarantee [insert type(s)] pursuant to Paragraph 46.1(), in the form attached hereto as Exhibit []. Within ten days after entry of this Consent Decree, Settling Defendant(s) shall execute or otherwise finalize all instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding in a form substantially identical to the documents attached hereto as Exhibit [], and such Performance Guarantee(s) shall thereupon be fully effective. Within thirty days of entry of this Consent Decree, Settling Defendant(s) shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding to the EPA Regional Financial Management Officer in accordance with Section XXVI (“Notices and Submissions”) of this Consent Decree[, with a copy to [insert name, title, and address of Regional financial assurance specialist, if one exists in the relevant Region]] and to the United States and EPA [and the State] as specified in Section XXVI.

[Alternative 46.2. For initial guarantees under subsection e:] Settling Defendant(s) have selected, and EPA has approved, as an initial Performance Guarantee a demonstration of satisfaction of financial test criteria pursuant to Paragraph 46.1(e) with respect to [list corporations making the guarantee if less than all Settling Defendants].

[Notes on Paragraph 46: (i) Case Teams should negotiate and finalize the form and substance, including value, of Settling Defendants' Performance Guarantee well in advance of the lodging of the Consent Decree, in order that the final Performance Guarantee mechanism can actually take effect within ten days after entry of the Consent Decree; (ii) Case Teams should also ensure that entities providing a demonstration or guarantee pursuant to Subparagraph (e) or (f) above (a) have submitted all documentation required under 40 C.F.R. § 246.143 (f) well in advance of the lodging of the Consent Decree in order that EPA can determine that such Performance Guarantee is sufficient and can take effect within ten days after entry of the Consent Decree, and (b) have fully and accurately reflected in their financial statements all of their environmental obligations to the United States, i.e., that all CERCLA and RCRA obligations guaranteed by such entity as a Performance Guarantee and/or as "financial assurance" have been properly accounted for in determining whether such entity passes the financial test referenced in 40 C.F.R. § 264.143(f).]

47. If at any time during the effective period of this Consent Decree, the Settling Defendant(s) provide a Performance Guarantee for completion of the Work by means of a demonstration or guarantee pursuant to Paragraph 46.1(e) or Paragraph 46.1(f) above, such Settling Defendant shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these methods unless otherwise provided in this Consent Decree, including but not limited to (i) the initial submission of required financial reports and statements from the relevant entity's chief financial officer and independent certified public accountant; (ii) the annual re-submission of such reports and statements within ninety days after the close of each such entity's fiscal year; and (iii) the notification of EPA within ninety days after the close of any fiscal year in which such entity no longer satisfies the financial test requirements set forth at 40 C.F.R. § 264.143(f)(1). For purposes of the Performance Guarantee methods specified in this Section XIII, references in 40 C.F.R. Part 264, Subpart H, to "closure," "post-closure," and "plugging and abandonment" shall be deemed to refer to the Work required under this Consent Decree, and the terms "current closure cost estimate" "current post-closure cost estimate," and "current plugging and abandonment cost estimate" shall be deemed to refer to the Estimated Cost of the Work.

48. In the event that EPA determines at any time that a Performance Guarantee provided by any Settling Defendant pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, or in the event that any Settling Defendant becomes aware of information indicating that a Performance Guarantee provided pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, Settling Defendant(s), within thirty days of receipt of notice of EPA's determination or, as the case may be, within thirty days of any Settling Defendant becoming aware of such information,

shall obtain and present to EPA for approval a proposal for a revised or alternative form of Performance Guarantee listed in Paragraph 46.1 of this Consent Decree that satisfies all requirements set forth in this Section XIII. In seeking approval for a revised or alternative form of Performance Guarantee, Settling Defendants shall follow the procedures set forth in Paragraph 50(b)(ii) of this Consent Decree. Settling Defendants' inability to post a Performance Guarantee for completion of the Work shall in no way excuse performance of any other requirements of this Consent Decree, including, without limitation, the obligation of Settling Defendant(s) to complete the Work in strict accordance with the terms hereof.

49. The commencement of any Work Takeover pursuant to Paragraph 96 of this Consent Decree shall trigger EPA's right to receive the benefit of any Performance Guarantee(s) provided pursuant to Paragraph 46.1(a), (b), (c), (d), or (f), and at such time EPA shall have immediate access to resources guaranteed under any such Performance Guarantee(s), whether in cash or in kind, as needed to continue and complete the Work assumed by EPA under the Work Takeover. If for any reason EPA is unable to promptly secure the resources guaranteed under any such Performance Guarantee(s), whether in cash or in kind, necessary to continue and complete the Work assumed by EPA under the Work Takeover, or in the event that the Performance Guarantee involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 46.1(e), Settling Defendant(s) shall immediately upon written demand from EPA deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed as of such date, as determined by EPA.

50. Modification of Amount and/or Form of Performance Guarantee.

a. Reduction of Amount of Performance Guarantee. If Settling Defendant(s) believe that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 46.1 above, Settling Defendant(s) may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, petition EPA in writing to request a reduction in the amount of the Performance Guarantee provided pursuant to this Section so that the amount of the Performance Guarantee is equal to the estimated cost of the remaining Work to be performed. Settling Defendant(s) shall submit a written proposal for such reduction to EPA that shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval for a revised or alternative form of Performance Guarantee, Settling Defendants shall follow the procedures set forth in Paragraph 50(b)(ii) of this Consent Decree. If EPA decides to accept such a proposal, EPA shall notify the petitioning Settling Defendant(s) of such decision in writing. After receiving EPA's written acceptance, Settling Defendant(s) may reduce the amount of the Performance Guarantee in accordance with and to the extent permitted by such written acceptance. In the event of a dispute, Settling Defendant(s) may reduce the amount of the Performance Guarantee required hereunder only in accordance with a final administrative or judicial decision resolving such dispute. No change to the form or terms of any Performance Guarantee provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraphs 48 or 50(b) of this Consent Decree.

b. Change of Form of Performance Guarantee.

(i) If, after entry of this Consent Decree, Settling Defendant(s) desire to change the form or terms of any Performance Guarantee(s) provided pursuant to this Section, Settling Defendant(s) may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, petition EPA in writing to request a change in the form of the Performance Guarantee provided hereunder. The submission of such proposed revised or alternative form of Performance Guarantee shall be as provided in Paragraph 50(b)(ii) of this Consent Decree. Any decision made by EPA on a petition submitted under this subparagraph (b)(i) shall be made in EPA's sole and unreviewable discretion, and such decision shall not be subject to challenge by Settling Defendant(s) pursuant to the dispute resolution provisions of this Consent Decree or in any other forum.

(ii) Settling Defendant(s) shall submit a written proposal for a revised or alternative form of Performance Guarantee to EPA which shall specify, at a minimum, the estimated cost of the remaining Work to be performed, the basis upon which such cost was calculated, and the proposed revised form of Performance Guarantee, including all proposed instruments or other documents required in order to make the proposed Performance Guarantee legally binding. The proposed revised or alternative form of Performance Guarantee must satisfy all requirements set forth or incorporated by reference in this Section. Settling Defendant(s) shall submit such proposed revised or alternative form of Performance Guarantee to the EPA Regional Financial Management Officer in accordance with Section XXVI ("Notices and Submissions") of this Consent Decree[, with a copy to **[insert name, title, and address of Regional financial assurance specialist, if one exists in the relevant Region]**]. EPA shall notify Settling Defendant(s) in writing of its decision to accept or reject a revised or alternative Performance Guarantee submitted pursuant to this subparagraph. Within ten days after receiving a written decision approving the proposed revised or alternative Performance Guarantee, Settling Defendant(s) shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding in a form substantially identical to the documents submitted to EPA as part of the proposal, and such Performance Guarantee(s) shall thereupon be fully effective. Settling Defendant(s) shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding to the EPA Regional Financial Management Officer within thirty days of receiving a written decision approving the proposed revised or alternative Performance Guarantee in accordance with Section XXVI ("Notices and Submissions") of this Consent Decree[, with a copy to **[insert name, title, and address of Regional financial assurance specialist, if one exists in the relevant Region]**] and to the United States and EPA [and the State] as specified in Section XXVI.

c. Release of Performance Guarantee. If Settling Defendant(s) receive written notice from EPA in accordance with Paragraph [51] hereof that the Work has been fully and finally completed in accordance with the terms of this Consent Decree, or if EPA otherwise so notifies Settling Defendant(s) in writing, Settling Defendant(s) may thereafter release, cancel, or discontinue the Performance Guarantee(s) provided pursuant to this Section. Settling Defendant(s) shall not release, cancel, or discontinue any Performance Guarantee provided pursuant to this Section except as provided in this subparagraph. In the event of a dispute, Settling Defendant(s) may release, cancel, or discontinue the Performance Guarantee(s) required hereunder only in accordance with a final administrative or judicial decision resolving such dispute.

[NOTE: A Performance Guarantee provided under this Section should not be released until the Work has been fully completed. The definition of Work includes all activities Settling Defendant(s) are required to perform under the Consent Decree, including O&M obligations. Therefore, Regions should ensure that an appropriate Performance Guarantee remains in place until all obligations, including O&M obligations, are fully satisfied in accordance with the terms of the Consent Decree.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF _____
_____ DIVISION

UNITED STATES OF AMERICA
[and STATE OF _____]

Plaintiffs,

v.

_____, INC.,

Defendants.

CIVIL ACTION NO. _____

MODEL RD/RA CONSENT DECREE
(August 16, 2005 Revisions to May 2001 Model)

[WORK TAKEOVER SECTION ONLY]

This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. EPA and DOJ may take action at variance with this model or its internal implementing procedures.

96. Work Takeover.

(a) In the event EPA determines that Settling Defendants have (i) ceased implementation of any portion of the Work, or (ii) are seriously or repeatedly deficient or late in their performance of the Work, or (iii) are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to the Settling Defendants. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Settling Defendants a period of 10 days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.

(b) If, after expiration of the 10-day notice period specified in Paragraph 96(a), Settling Defendants have not remedied to EPA’s satisfaction the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portions of the Work as EPA deems necessary (“Work Takeover”). EPA shall notify Settling Defendants in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 96(b).

(c) Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 75, to dispute EPA’s implementation of a Work Takeover under Paragraph 96(b). However, notwithstanding Settling Defendants’ invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 96(b) until the earlier of (i) the date that Settling Defendants remedy, to EPA’s satisfaction, the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice or (ii) the date that a final decision is rendered in accordance with Section XIX (Dispute Resolution), Paragraph 75, requiring EPA to terminate such Work Takeover.

(d) After commencement and for the duration of any Work Takeover, EPA shall have immediate access to and benefit of any performance guarantee(s) provided pursuant to Section XIII of this Consent Decree, in accordance with the provisions of Paragraph 49 of that Section. If and to the extent that EPA is unable to secure the resources guaranteed under any such performance guarantee(s) and the Settling Defendant(s) fail to remit a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed, all in accordance with the provisions of Paragraph 49, any unreimbursed costs incurred by EPA in performing Work under the Work Takeover shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Payment for Response Costs).